The only point of substance in this appeal arises out of certain questions put to the appellant by the learned trial Judge after the appellant had made a statement from the dock. At the close of the case for the prosecution, when the appellant was called upon to enter on his defence, he elected to make an unsworn statement. He then proceeded to make a lengthy statement in the course of which he gave an account of his movements during the relevant period and a description of certain events which, according to him, occurred after he had been arrested and at the end of his statement the learned Judge put certain questions to him.

Counsel for the prosecution agreed that an accused person who makes an unsworn statement should not be questioned by the trial Judge except for the purpose of clearing up ambiguities but maintained that the questions which were put to the appellant in this case were merely by way of clarification of certain matters mentioned in his statement. In our opinion the questions went further than clarification and actually elicited important facts and admissions which would not otherwise have been before the jury. Moreover these matters were referred to again in the summing-up and it seems impossible to say in these circumstances that this did not have the effect of prejudicing the appellant.

We are of the opinion therefore that the objection taken by counsel for the appellant in regard to this matter is justified. It is clear, however, that there was in this case evidence upon which the jury might reasonably have convicted if there had been no departure from the proper practice and accordingly we have directed that there should be a new trial.

New trial ordered.

In re A TAX-PAYER

[C. A. (Mathew C.J., Whyatt C.J. (S) and Rigby J.) October 20, 1956]

[Penang — F.M. Civil Appeal No. 5 of 1956]

Income Tax Ordinance, 1947, s. 31(3), (5) & (7) — "Source of income" — "Trade, business, profession, vocation or employment" — Barrister taking employment as assistant Advocate and Solicitor — Whether income from "carrying on an employment" or from "carrying on a profession" — Whether person on becoming partner permanently ceased to carry on employment and commenced to exercise a profession.

Practice — Misnomer of party in Notice of Appeal — Application to amend.

This was an appeal from the decision of Spenser Wilkinson J. reported at p. 94, *ante*, where it was held that the taxpayer did not cease to carry on an employment within the meaning of subsection (5) of section 31 of the Income Tax Ordinance when he ceased to be an employee in a firm of Advocates and Solicitors and became a partner in the firm, and consequently he could not be re-assessed under the provisions of that section.

The issue raised by the appeal was whether the taxpayer permanently ceased to carry on an employment and commenced to exercise a profession when he became a partner as from January 1, 1954, so as to bring himself within the provisions of the relative subsections of section 31 of the Income Tax Ordinance.

Held: on a proper construction of subsection (5) of section 31 of the Income Tax Ordinance the taxpayer permanently ceased to carry on an employment when he ceased to be an assistant in the firm.

The next question raised in the appeal was from which of the five sources of income: "trade, business, profession, vocation or employment", was the taxpayer receiving income whilst he was working as an assistant?

Held: although the taxpayer was exercising his profession when he was serving as an assistant, he was not receiving professional fees; those were paid to the firm and he was paid a monthly salary, therefore, the salary paid to him whilst serving as an employee was received from "carrying on an employment".

Cases referred to:—

(1) *The Assunta* (1902) P. 150.

(2) *Davies v. Braithwaite* (1931) 2 K.B. 628.

COURT OF APPEAL.

F. G. Cooke (Federal Counsel) for the appellant.

F. G. Pooley for the respondent.

The facts appear sufficiently from the judgment of Whyatt C.J. (S.) which was read in open Court by the Ag. Senior Asst. Registrar, Penang.

Whyatt C.J. (S.) : — This is an appeal from a decision of Mr. Justice Spenser Wilkinson in which he held, affirming a decision of the Board of Review, that the taxpayer did not cease to carry on an employment within the meaning of sub-section (5) of section 31 of the Income Tax Ordinance 1947 when he ceased to be an employee in a firm of advocates and solicitors and became a partner in the firm, and consequently he could not be re-assessed under the provisions of that section.

The facts are not in dispute and may be briefly summarised as follows. In January 1950 the taxpayer was called to the Bar in England and in July of the same year he took up an appointment as an assistant in a firm of advocates and solicitors carrying on business in the Federation. Under the terms of his agreement with the firm, the taxpayer was to be employed for a term of three years at a monthly salary and to be

entitled to certain leave and passage rights at the end of that period. He commenced work on the 23rd July 1950 and was subsequently admitted to practice as an advocate and solicitor in April 1951, and continued as an assistant in the firm until the 31st December 1953; on that day he entered into a partnership agreement with the sole surviving partner of the firm and with another advocate and solicitor whereby it was agreed that they should carry on "as from the first day of January 1954, the business of advocates, solicitors and notaries public", and that the partnership, using the style of the old firm, should continue for three years and three months from that date.

The substantial issue raised by this appeal is whether on these facts the taxpayer permanently ceased to carry on an employment on the 31st December 1953 and commenced to exercise a profession on the 1st January 1954 so as to bring himself within the provisions of the relative sub-sections of section 31 of the Income Tax Ordinance, but before dealing with this issue, it is necessary to refer briefly to two preliminary points raised by counsel for the taxpayer. In the first place, it was contended that the appeal from the Board of Review was not properly brought because the Comptroller was erroneously described in the Notice of Appeal as "Comptroller of Inland Revenue" instead of "Comptroller of Income Tax". There is no such person as "the Comptroller of Inland Revenue" but the mistake (which was made initially by the taxpayer in his appeal to the Board of Review) was not noticed until the case came on for hearing before Mr. Justice Spenser Wilkinson. Counsel for the Comptroller then applied to amend the misnomer but counsel for the taxpayer contended that as the Notice of Appeal was defective when it was filed, it could not subsequently be amended so as to make it a valid Notice of Appeal after the statutory period for filing a Notice of Appeal had expired. The learned Judge rejected this contention and allowed the amendment on the ground that the position was analogous to an improper description of a plaintiff in a writ which it was held in *The Assunta*[1] was a mere irregularity which could not be relied upon by a defendant who has taken a fresh step in the action with knowledge of it. In the present case the taxpayer not only knew of the mistake when he entered an appearance to the appeal but, as I have already said, he was himself the originator of the misnomer in the proceedings before the Board of Review. I agree, therefore, with the view of the learned Judge that the taxpayer is precluded from taking advantage of this point at this stage of the proceedings.

The second preliminary point raised by the taxpayer was a little startling in its novelty. It was argued that as the taxpayer's employment continued until the end of 1953, it could not be said to have ceased in the year of assessment which ended on the 31st December 1953 since there was no moment of time in 1953 when the taxpayer was not exercising his employment; in other words, the Ordinance does not provide for a case like the present where the employment and the year of assessment terminate simultaneously. The short answer in my view to this argument is that it is not necessary that the employment should cease before the end of the year of assessment before it can be said to have ceased in that year; it is sufficient, both in logic and in common sense, if the cessation occurs at any moment of time, even the last moment, in that year, and it matters not that the employment and the year expire together.

I now turn to consider the main question in this appeal which depends for its answer upon a proper construction of sub-section (5) of section 31, the relevant part of which reads as follows :—

> "Where a person permanently ceases to carry on or exercise a trade, business, profession, vocation or employment, his statutory income therefrom shall be . . . (a) as regards the year of assessment in which the cessation occurs, the amount of the income of that year, . . ."

The first point to be noticed in construing this sub-section is that the five categories "trade, business, profession, vocation or employment" are an enumeration of five different sources of income. This is clear from the words, "statutory income therefrom", which plainly refer to income received from sources specified in the immediately preceding phrase "trade, business, profession, vocation or employment". If there were any doubt on this point, it would, in my view, be resolved by the reference at the commencement of sub-section (7) of the same section to a person ceasing to possess "a source of income other than a source specified in sub-section (5) of this section". The expression "source" specified in sub-section (5) refers back to "trade, business, profession, vocation or employment". In other words, each of the five categories specified in sub-section (5) is described as a source of income, *eo nomine,* in sub-section (7) of section 31. I would add that the words, "trade, business, profession, vocation and employment," are used in the same sense in section 10. This section deals with the imposition of income tax, and section 31 deals with the computation of statutory income, and it would obviously lead

to difficulties and anomalies in the administration of the Ordinance if different meanings were attributed to the same words in these two sections; furthermore, it would conflict with the ordinary canon of construction that the same words are, as a general rule, presumed to be used in the same sense throughout a statute.

This being the construction I place upon sub-section (5) of section 31, the next question is, from which of these five sources was the taxpayer receiving income whilst he was working as an assistant? The Comptroller contends that he was receiving income from "carrying on an employment" whereas the taxpayer maintains that it was income from "exercising a profession". It is, of course, true, in a colloquial sense, that the taxpayer was exercising his profession when he was serving as an assistant, for he was appearing in Court, interviewing clients, giving professional advice and performing various other professional duties of a like nature. But though he was performing professional work, he was not receiving professional fees; those were paid to the firm and he was paid a monthly salary. The contract which provided for the payment of the salary described him as "the employee", and it is abundantly clear that the relationship between the parties was that of employer and employee and that the contract was one of employment. It follows that the salary paid to him whilst serving as an employee was received from "carrying on an employment", not from "exercising a profession." Moreover, it is clear that this particular source of income ceased on the 31st December 1953 and that instead of being entitled under a contract of employment to a monthly salary, the taxpayer then became entitled under a partnership deed to a share of profits. The Comptroller contended that sub-section (3) of section 31 applied to the new source of income, and plainly, if the construction placed on sub-section (5) is correct, by parity of reasoning, the provisions of sub-section (3) apply to the income from the partnership profits.

Although a number of English authorities were cited in the course of argument, I do not think it is necessary to refer to them as they are concerned with Schedule D and Schedule E of the Income Tax Act 1918 which are very different in their wording from sub-section (5) of section 31, but I ought perhaps to refer to the case of *Davies v. Braithwaite*[2] as the learned Judge relied upon it to some extent in reaching his conclusion. In that case the issue Mr. Justice Rowlatt had to determine was whether an actress could be said to be exercising a profession if she did so by means of contracts of employment with theatrical producers, and in the course of his judgment he said, "I think that whatever she does and whatever contracts she makes are nothing but incidents in the conduct of her professional career." The learned Judge thought that that *dictum* provided some guidance in the present case, but more to the point, it seems to me, is the observation of Mr. Justice Rowlatt at p. 635 where he says, "I do not see why he (the taxpayer) should not have both an employment as well as a profession. For instance, a musician who holds an office or employment under a permanent engagement can at the same time follow his profession privately." Mr. Justice Rowlatt is there saying quite plainly that, for United Kingdom income tax purposes at any rate, the question whether a taxpayer is exercising a profession or carrying on an employment does not depend upon the nature of his work but upon the source of his income. It seems to me, therefore, that *Davies v. Braithwaite*[2] tends to support the contention of the Comptroller rather than that of the taxpayer in the present case.

However, as I have already indicated, the English cases do not provide any sure guidance in this matter owing to the different wording of the United Kingdom Income Tax Act, and I prefer to rest my conclusion on the construction of sub-section (5) of section 31, assisted, as I have pointed out, by the wording of sub-section (7) of the same section and by the provisions of section 10. In my view sub-section (5), properly construed, fully supports the Comptroller's contention that the taxpayer permanently ceased to carry on an employment when he ceased to be an assistant in the firm of advocates and solicitors on the 31st December 1953. Accordingly I would allow this appeal. I understand the parties have agreed there should be no order as to costs. I would propose that this case be reported in the same manner as the proceedings in the Court below were reported in (1956) Malayan Law Journal 94.

Mathew C.J. : —I have had the advantage of reading the judgment of the learned Chief Justice of the Colony of Singapore in this appeal with which I am in agreement and have nothing to add.

Rigby J. : —I also concur.

Appeal allowed.

Solicitors : *Presgrave & Matthews.*